RECORD AND BRIEFS

No. 17-43

In the Supreme Court of the United States

LOS ROVELL DAHDA AND ROOSEVELT RICO DAHDA,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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Remarkably, the government devotes virtually all of its brief in opposition to arguing the merits of its interpretation of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2510-2520. When it comes to whether this Court should actually grant review, however, the government has conspicuously little to say. The government does not dispute that the question presented—whether Title III requires suppression of evidence obtained pursuant to a wiretap order that is facially insufficient because the order exceeds the judge's territorial jurisdiction—is an important and recurring one which

arises frequently in the lower courts, but which has never come before this Court.

While the government halfheartedly contends that the courts of appeals are not divided on the question presented, the government completely ignores the fact that the Tenth Circuit (in the decisions below) and the District of Columbia Circuit (in an earlier decision) have expressly recognized the existence of a circuit conflict. In fact, the circuits are in direct conflict both on the issue whether Title III's territorial-jurisdiction limitation implicates a "core concern" of the statute, and on the antecedent issue whether the extratextual "core concerns" requirement even applies in the context of facially insufficient wiretap orders. Those conflicts warrant the Court's review, and the government offers no valid reason to postpone it. The petition for a writ of certiorari should therefore be granted.

1. The government contends that the Tenth Circuit's decisions do not conflict with the decision of any other court of appeals. See Br. in Opp. 17-21. That contention is plainly incorrect.

In the decisions below, the Tenth Circuit acknowledged that, by holding that the territorial-jurisdiction limitation of Section 2518(3) did not implicate a "core concern" of Title III warranting suppression, it was creating a conflict with the D.C. Circuit's decision on that question in *United States* v. *Glover*, 736 F.3d 509 (2013). See Pet. App. 21a, 40a. And in *Glover*, the D.C. Circuit in turn recognized that, by holding that suppression is the mandatory remedy for evidence obtained pursuant to a facially insufficient order, it was creating a conflict with "a number of [its] sister circuits [that] have imported the core concerns test into paragraph (ii)" of Section 2518(10)(a). 736 F.3d at 513.

In the face of those express recognitions of a circuit conflict, the government takes a curious approach. The government acknowledges that "the courts of appeals have used different language in describing the types of insufficiencies that do not warrant suppression" and that "some have reached different conclusions regarding certain specific defects." Br. in Opp. 17. Yet it contends that the courts of appeals are in "general agreement" that "some defects" do not require suppression. *Id.* at 17-18.

At the impossibly high level of generality at which it is stated, that proposition may be true. But the salient inquiry for purposes of certiorari is whether there is a circuit conflict *on the question presented here*, which focuses on a particular type of defect: namely, whether suppression is required for evidence obtained pursuant to a wiretap order that is facially insufficient *because the order exceeds the judge's territorial jurisdiction*. See Pet. i. And concerning that type of defect, there can be no doubt that a conflict exists.

In the D.C. Circuit, "[s]uppression is the mandatory remedy when evidence is obtained pursuant to a facially insufficient warrant." *Glover*, 736 F.3d at 513. The D.C. Circuit does not conduct—and indeed forbids—an additional inquiry (like the Tenth Circuit conducted in these cases, see Pet. App. 21a, 40a) into whether the facial insufficiency results from the violation of a statutory provision that implicates the "core concerns" underlying Title III. See *Glover*, 736 F.3d at 513. Instead, the D.C. Circuit applies a "mechanical test" under which "[t]here is no room for judicial discretion." *Ibid.*

Perhaps the best evidence that the government is attempting to gloss over a circuit conflict is that it attributes to *petitioners* the argument that "subparagraph (ii) establishes 'a mechanical test'—*i.e.*, 'either the warrant is facially insufficient or it is not,'" Br. in Opp. 12 (citing Pet.

13), before contending that the argument is "incorrect," *ibid.* As the government fails to mention, however, petitioners were actually quoting from Judge Silberman's opinion for the D.C. Circuit in *Glover*. See Pet. 13 (quoting *Glover*, 736 F.3d at 513).

By applying a "mechanical test" for determining whether to suppress evidence collected pursuant to an order that is facially insufficient under paragraph (ii), the D.C. Circuit stands in conflict with those courts—including the Tenth Circuit in the decisions below—that require suppression only if there is a violation of a statutory requirement that implicates a "core concern" of Title III. See Pet. 15-16 (citing six other courts of appeals that apply the "core concerns" test). Clearly, the government disagrees with the "mechanical test" that the D.C. Circuit adopted. See Br. in Opp. 12. But that disagreement merely highlights the existence of a circuit conflict that warrants this Court's review.

Notably, the D.C. Circuit recently reiterated its adherence to the "mechanical test" for the suppression of evidence derived from a facially insufficient order. In *United States* v. *Scurry*, 821 F.3d 1 (2016), the D.C. Circuit reaffirmed that, if a wiretap authorization order is "insufficient on its face" under Section 2518(10)(a)(ii), "suppression is mandatory," without any additional requirement that the facial insufficiency must have resulted from the violation of a statutory requirement that implicates a "core concern" of Title III. *Id.* at 5, 13.

To be sure, as the government notes (Br. in Opp. 18), the D.C. Circuit acknowledged in *Scurry* that it had left open the possibility in *Glover* that a "technical defect" in a wiretap order "might not rise to the level of facial insufficiency." 821 F.3d at 12. Critically for present purposes, however, the D.C. Circuit did not suggest in *Scurry* that

a violation of the territorial-jurisdiction restriction in Section 2518(3) could be excused as such a "technical defect." To the contrary, in *Glover*, the court expressly rejected that proposition (and proceeded to hold that, even if an inquiry into the "core concerns" of Title III were required for suppression purposes, "territorial jurisdiction *is* a core concern of Title III"). 736 F.3d at 515. If anything, therefore, *Scurry* simply reinforces the D.C. Circuit's position on the question presented.

Faced with the obvious (and expressly recognized) conflicts both on the question whether violation of the territorial-jurisdiction limitation implicates the "core concerns" of Title III and on the antecedent question whether an inquiry into "core concerns" is even required at all, the government resorts to drawing irrelevant factual distinctions between *Glover* and the decisions below—including distinctions concerning whether the government explicitly intended to execute the wiretap order at issue outside the judge's jurisdiction, see Br. in Opp. 19, and whether communications were actually intercepted outside the judge's jurisdiction, see *id.* at 20. But there is no reason to believe that those factual distinctions were relevant to either court's analysis—and, given each court's recognition of the existence of a circuit conflict, there is good reason to believe they were not.

Instead, the pertinent legal question is whether "suppression is * * * required for [a] district court's authorization of wiretaps beyond the court's territorial jurisdiction." Pet. App. 21a. The answer to that question does not depend on any other factual considerations; it is the *authorization* to exceed the court's territorial jurisdiction that renders a wiretap order facially insufficient under Section 2518(10)(a)(ii). Accordingly, both in the decisions below and in *Glover*, the court focused on whether the au-

thorization was improper, not on whether communications were actually intercepted outside the judge's jurisdiction. See Pet. App. 21a-24a; *Glover*, 736 F.3d at 514.

In short, the government cannot sincerely dispute that the courts of appeals have announced and applied conflicting legal standards regarding whether suppression is the automatic remedy for evidence obtained pursuant to a facially insufficient order resulting from a violation of Title III's territorial-jurisdiction limitation—or that the resolution of that conflict would be outcome-determinative in these cases. Because there can be no doubt that these cases would have come out differently if they had been decided in the D.C. Circuit, there is a valid circuit conflict warranting the Court's review. See Stephen M. Shapiro et al., *Supreme Court Practice* § 6.31(a), at 479 (10th ed. 2013).

2. Tacitly recognizing that these cases are compelling candidates for further review, the government devotes the vast majority of its brief in opposition to an extended discussion of the merits. See Br. in Opp. 8-17. As we have already explained, the government's merits position is incorrect, largely for the reasons given by the D.C. Circuit in *Glover*. See Pet. 17-22. We address just a few additional points concerning the government's position here and leave the remainder to subsequent merits briefing if certiorari is granted.

To begin with, the government largely ignores the fact that this Court developed the "core concerns" test in an effort to distinguish paragraph (i) of Section 2518(10)(a) from paragraphs (ii) and (iii) and thereby give each paragraph independent content. See Pet. 18-20. The government attempts to argue forward from that limitation on paragraph (i), arguing that Congress could not have intended to allow *facial insufficiency* under paragraph (ii)

to result in suppression regardless of whether a "core concern" of the statute is implicated when *unlawful interception* under paragraph (i) does not result in suppression unless the "core concerns" test is satisfied. See Br. in Opp. 14-15.

But that argument simply takes issue with Congress's choice to include facial insufficiency as an independent ground for suppression in Title III. As this Court has held, "paragraphs (ii) and (iii) must be deemed to provide suppression for failure to observe some statutory requirements that would not render interceptions unlawful under paragraph (i)." *United States* v. *Giordano*, 416 U.S. 505, 527 (1974); see *United States* v. *Chavez*, 416 U.S. 562, 575 (1974). The whole point of this Court's decisions in *Chavez* and *Giordano* was to give independent content to each paragraph by limiting the scope of paragraph (i). Yet reading the same limitation into paragraph (ii) would defeat that objective and render paragraph (ii) entirely superfluous. The government fails to identify a single circumstance under its interpretation in which a facially insufficient warrant would unambiguously justify suppression under paragraph (ii) where the interception was lawful under paragraph (i). See Br. in Opp. 15.

Instead, the government timidly suggests that "a court *might* conclude that suppression is warranted under subparagraph (ii) even if the interception complied with the terms of the order and was not 'unlawful[]' under subparagraph (i)" in one circumstance: namely, where "the identity of the person whose communications are to be intercepted" was "known" under 18 U.S.C. 2518(4) but not included in the wiretap order. Br. in Opp. 15 (emphasis added). But the government offers no case law to support the proposition that suppression would be warranted in that circumstance under paragraph (ii)—nor could it,

given that the government's hypothetical closely resembles the facts of *United States* v. *Donovan*, 429 U.S. 413 (1977).

In *Donovan*, the relevant applications identified some persons whose communications were to be intercepted, but failed to identify additional known persons. 429 U.S. at 419-420. The Court initially stated that there was "no basis" to suggest the orders were facially insufficient under Section 2518(10)(a)(ii). *Id.* at 432. That made eminent sense, because it would have been impossible to detect from the four corners of the orders that they contained the defect of failing to identify the persons at issue. The Court proceeded to hold that the failure to identify those persons did not require suppression under paragraph (i) either, because it did not implicate the "core concerns" of Title III. See *id.* at 433-435. *Donovan* thus strongly suggests that, in the government's hypothetical, the defect either would not implicate paragraph (ii) at all, or would not satisfy the "core concerns" test even if it did.

The government thus cannot dodge the inescapable conclusion that paragraph (ii) would be entirely subsumed within paragraph (i) if the extratextual "core concerns" test were applied to it. Congress specifically chose to provide for suppression when the facial insufficiency of a wiretap order does not rise to the level of unlawful interception, and that choice cannot be overridden under the guise of statutory interpretation.

Finally on the merits, the government offers no valid response to petitioners' contention that, even if the "core concerns" test did apply here as a prerequisite to suppression, the failure to comply with Title III's territorial-jurisdiction limitation implicates the "core concerns" of the statute. See Pet. 20-22; *Glover*, 736 F.3d at 515. It is a fundamental principle of our legal system that courts may act only within their jurisdictions, and the government

does not dispute that the territorial-jurisdiction limitation at least limits forum shopping, even if it does not prevent it altogether. See Br. in Opp. 16-17.

3. The government does not dispute that the question presented in these cases is one of obvious importance to the federal criminal system or that the frequency with which the issue arises further supports review. Instead, the government makes two passing vehicle arguments, see Br. in Opp. 21-22, both of which are flawed and unpersuasive.

First, the government argues that the wiretap orders at issue here were not facially insufficient at all, because there is no affirmative requirement to specify a territorial limitation on the face of a Title III order. See Br. in Opp. 21-22; see also *id.* at 11-12. As a preliminary matter, the government did not raise that argument below, and it is therefore forfeited. See *Heckler* v. *Campbell*, 461 U.S. 458, 468 n.12 (1983).

In any event, any such argument would be insubstantial. Title III expressly permits a judge only to enter a wiretap order "authorizing or approving interception of wire, oral, or electronic communications *within the territorial jurisdiction of the court in which the judge is sitting*." 18 U.S.C. 2518(3) (emphasis added). While the statute proceeds in the next subsection (Section 2518(4)) to identify additional information that must be contained on the face of the order, we are aware of no court that has held that a Title III wiretap order need not include a territorial-jurisdiction limitation, notwithstanding the plain language of Section 2518(3)—much less that an order affirmatively authorizing interception "in any other jurisdiction within the United States," like the ones at issue here, is facially sufficient. See Pet. 6. The government similarly identifies no court that has adopted that counterintuitive position. Not surprisingly, therefore, both the

Tenth Circuit (in the decisions below) and the D.C. Circuit (in *Glover*) operated on the understanding that a violation of the territorial-jurisdiction limitation goes to the facial sufficiency of the order. See Pet. App. 15a, 20a; *Glover*, 736 F.3d at 515.

Second, the government argues that any error in the admission of the evidence from the wiretap orders was harmless. See Br. in Opp. 22. But that argument is also insubstantial. Any error here can hardly be deemed harmless in light of the court of appeals' acknowledgment that "[m]uch of the evidence" against petitioners was obtained through the wiretap orders, see Pet. App. 14a, 39a, and in light of the government's heavy reliance on the wiretap evidence in its own briefing, see 15-3236 Gov't C.A. Br. 3-6. In any event, the court of appeals ultimately reserved judgment on the harmlessness question. See Pet. App. 25a n.8. If this Court holds that the admission of the wiretap evidence was erroneous, it can leave harmlessness for the court of appeals to consider on remand, as it "routinely" does in similar cases. See *Hicks* v. *United States*, 137 S. Ct. 2000, 2000 (2017) (Gorsuch, J., concurring).

* * * * *

In sum, these cases present an acknowledged circuit conflict on a question of exceptional legal and practical importance. The Court should grant review to resolve the conflict and correct a chronic misinterpretation of a statutory provision that plays a central and growing role in the federal criminal system. The petition for a writ of certiorari should be granted.

Respectfully submitted.

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